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Supervisors Beware: The Family and Medical Leave Act May Be Hazardous to Your Health

Erratum

273

SUPERVISORS BEWARE: THE FAMILY AND MEDICAL LEAVE ACT MAY BE HAZARDOUS TO YOUR HEALTH

*Michael L. Ripple**

Six years have passed since President William Jefferson Clinton signed his first piece of legislation, the Family and Medical Leave Act of 1993 (FMLA).¹ After almost a decade of consideration, Congress enacted the FMLA to establish a minimum standard for employee-leave during times of medical necessity.² Noting the growing number of dual-earner households,³ the FMLA's purpose is to guarantee job security for those individuals forced to provide care for either their young children or other family members afflicted with serious medical conditions.⁴ Under the FMLA, an "eligible employee"⁵ is entitled to a total of twelve weeks of unpaid leave during any twelve-month period⁶ for the following reasons: to care for the birth or adoption of a child,⁷ to care for one's own serious health condition,⁸ or to care for a seriously ill family mem-

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1. 29 U.S.C. § 2601 (1999).

2. See Allan N. Taffet, *Family Medical Leave Act Five Years Later*, N.Y.L.J., Nov. 4, 1997 at 1.

3. See 29 U.S.C. § 2601(a)(1) (1999).

4. See 29 U.S.C. § 2601(a)(2)-(4).

5. See 29 U.S.C. § 2611(2)(A). The term "eligible employee" means an employee who has been employed for at least 12 months by the employer from whom leave is requested under § 2612 of this title and "[the employee must have been employed] for at least 1,250 hours of service with such employer during the 12 month period." *Id.*

6. See 29 U.S.C. § 2612(a)(1).

7. See 29 U.S.C. § 2612(a)(1)(A). The FMLA allows for leave for "the birth of a son or a daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612(a)(1)(B). Additionally, leave is granted "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care." *Id.*

8. See 29 U.S.C. § 2612(a)(1)(D). The statute provides leave for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." *Id.*

ber.⁹ If a person takes FMLA leave, an employer must maintain that employee's health benefits.¹⁰ Upon return to employment, the employee must be reinstated to the position held when the leave commenced or to a position of equal terms, conditions, and benefits of employment. These benefits form the core protections mandated by the FMLA.

Despite the seemingly vast coverage afforded to individuals, the FMLA is far from settled law with respect to a number of issues. One of these issues, and the subject of this Comment, is whether the term "employer"¹¹ as defined in the FMLA, extends beyond the corporate entity to individual corporate supervisors.

Particularly troubling to the business community and to the district courts that have addressed this issue is the apparent ambiguity created by the definition. The definition of the term "employer" as provided by Congress does not explicitly mention individual liability. Instead, the FMLA's definition of "employer" provides that

any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year; [this] includes any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.¹²

Because the language defining "employer" appears ambiguous with its reference to the "any person" inclusion, courts have looked to other employment law statutes for guidance in interpreting the term "employer." For example, some courts have looked to the meaning of "employer" as defined by the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA),¹³ and Title VII.¹⁴ Tradition-

9. See 29 U.S.C. § 2612(a)(1)(C). Likewise, leave is permitted "[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health problem." *Id.*

10. See 29 U.S.C. § 2614(a)(2). "The taking of leave under section 2612 of this title shall not result in the loss of any employment benefits accrued prior to the date on which the leave commenced." *Id.*

11. 29 U.S.C. §§ 2611(4)(A)(i)-(ii)(I).

12. *Id.*

13. 29 U.S.C. § 630(b) (1999).

The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be

ally, all three of these statutes have been interpreted similarly because of the language each uses to define "employer." Title VII, the most litigated of the three statutes, provides that the term "employer" means "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . ."¹⁵

Although the ADA, ADEA, and Title VII all preclude personal liability for supervisors, courts have interpreted the term "employer" in the FMLA similar to the Fair Labor Standards Act (FLSA).¹⁶ The FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ."¹⁷ Under the FLSA, some courts determined that personal liability attaches to *anyone* acting in the interest of the corporate employer.¹⁸ These courts recog-

considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Id.

14. See *Carter v. Rental Uniform Service of Culpepper, Inc.*, 977 F. Supp. 753 (W.D. Va. 1997); *Frizzell v. Southwest Motor Freight*, 906 F. Supp. 441 (E.D. Tenn. 1995). Both cases, in holding that no individual liability for supervisors existed under the FMLA, stated that other courts interpreting federal anti-discrimination laws have generally not imputed individual liability upon supervisors. However, the following cases hold that the statutory language included in the FMLA closely tracks the language of the Fair Labor Standards Act (FLSA). Therefore, since the FLSA imposes individual liability upon supervisors, the courts held the FMLA does also. See *Bryant v. Delbar Products, Inc.*, 18 F. Supp.2d 799 (M.D. Tenn. 1998); *Rupnow v. TRC, Inc.*, 999 F. Supp. 1047 (N.D. Ohio 1998); *Beyer v. Elkay Mfg. Co.*, 1997 U.S. Dist. Lexis 14459 (N.D. Ill. 1997); *Johnson v. A.P. Products, Ltd.*, 934 F. Supp. 625 (S.D.N.Y. 1996); *Waters v. Baldwin County*, 936 F. Supp. 860 (S.D. Ala. 1996); *Knussman v. State of Md.*, 935 F.Supp. 659 (D. Md. 1996); *Reich v. Midwest Plastic Eng'g, Inc.*, 1995 WL 478884 (W.D. Mich. 1995); *Freemon v. Foley*, 911 F. Supp. 326 (N.D. Ill. 1995); *McKiernan v. Smith-Edwards-Dunlap Co.*, 1995 WL 311393 (E.D. Pa. 1995).

15. 42 U.S.C. § 2000e(b) (1998).

16. 29 U.S.C. §§ 201-219 (1998).

17. 29 U.S.C. § 203(d).

18. See *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 329 (5th Cir. 1993); see also *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299, 303 (5th Cir. 1988).

nized a similarity between the FMLA and FLSA statutory definitions of "employer," which would include personal liability for individual supervisors.

This Comment analyzes whether Congress enacted the FMLA as a labor statute which should therefore follow the statutory construction set forth in the FLSA or as an anti-discrimination statute such as the ADA, ADEA, and Title VII. Section I of this Comment explores the origination, construction, and protections of the FMLA. Section II follows the expanding case law interpreting this statute and sets forth how the majority of courts considering this vexing issue interpret the FMLA in the same manner as the FLSA. Section III examines the reasoning used by the courts in reaching their decisions and explains why the FMLA differs from anti-discrimination statutes. This difference is evident in that the FMLA creates a statutory entitlement, whereas anti-discrimination statutes only rectify identifiable discriminatory practices. Section IV examines other statutory provisions, besides merely the definition of "employer," that distinguish the FMLA from the other anti-discrimination statutes. Finally, this Comment concludes that, while the goals and application of the FMLA are similar to anti-discrimination laws, this alone does not detract from Congress' intention to have the FMLA operate consistently with the standards established in the FLSA.

I. BACKGROUND ON THE FORMATION OF THE FMLA

President Clinton signed the FMLA into law on February 5, 1993. As part of his "People First" campaign, the President wanted the FMLA as a cornerstone in the re-establishment of family values.¹⁹ Lauded as the first piece of legislation addressing the needs of women working outside the home, Congress enacted the FMLA in response to the growing strain work imposed on both single and two-parent families.²⁰ Although the Act was strongly criticized by the business community because of the perceived expense to small businesses, Congress passed the FMLA in response to a number of demographic, economic, and social changes in American family life.²¹ The impact of these changes continuously forced families to balance the needs of family life against the economic reality of the workforce.²² Based on these factors, Congress enacted the

19. See *Issues '92*, THE BUFFALO NEWS, Mar. 1, 1992, at A10.

20. See 29 U.S.C. § 2601(a)(1).

21. See S. Rep. No. 103-3, at 7 (1993).

22. See *id.*

FMLA "as a minimum labor standard to address significant new developments in today's workplace."²³ Senator Christopher Dodd (D-CT), a staunch proponent of the FMLA, believed that Congress enacted the FMLA as legislation mandating new labor standards, not unlike earlier legislation initiated to cover Social Security, occupational safety and health.²⁴

In drafting the legislation, Congress attempted to strike a harmonious balance between the growing evolution of the workforce²⁵ while continuing to recognize the needs of small employers. As with other labor legislation, Congress recognized the private industry's failure to adequately address the increasing demands on working families. This failure to relieve the pressure on American workers²⁶ provided the backdrop for the FMLA's dual nature: responding to the growing need among workers to balance the reality of work against the need to provide medical and palliative care for family members.

During hearings on the FMLA, Congress noted that since 1950, the number of women entering the workforce increased by one million workers per year.²⁷ As a result of this increased female participation in the workforce, over two-thirds of women with school-aged children worked outside the home by 1990.²⁸ In part, this dramatic increase reflected the rising percentage of single-parent households headed by women. The Senate Report on the FMLA indicated that, in 1988, the percentage of single-parent households accounted for approximately twenty-seven percent of all family groups having children under the age of eighteen.²⁹ Thus, keeping women employed emerged as "a critical [issue] to keeping their families above the poverty line."³⁰

The Senate Report also emphasized the dramatic shift in America's elderly population. With the improvements in medical care and bio-

23. *Id.*

24. See 139 Cong. Rec. S1254, S1257 (Feb. 3, 1993) (statements of Sen. Dodd).

25. See S. Rep. No. 103-3, at 7.

26. See S. Rep. No. 103-3 at 7. "Before Congress will enact a statute addressing a pressing social problem, findings must indicate that corrective action undertaken by employers is inadequate to relieve the social condition." *Id.*

27. See *id.* at 8.

28. See 139 Cong. Rec. H365, 367 (Feb. 3, 1993) (statements of Rep. Gordon).

29. See S. Rep. No. 103-3, at 8.

30. *Id.*

technology, the elderly became the fastest growing segment of the population.³¹ In fact, Congress found that approximately thirty-two million Americans are over the age of sixty-five.³² The National Committee on Aging also estimated 20-25 million Americans, or one out of every five workers, have some care-giving responsibility for an older relative.³³ Based on these findings, Congress concluded that without a comprehensive policy on family leave, further demands for elder care would erode both familial relationships and the economy.³⁴ These social realities formed the background for Congress' desire to establish a new labor standard.

In addition to the core protections set forth in the Introduction, when an employee requests leave under the FMLA, an employer³⁵ may not interfere with, restrain, or prevent any employee from exercising the rights guaranteed by the Act.³⁶ This provision prohibits any employer from discriminating against employees who exercise their statutory rights. Thus, the protection of the FMLA is twofold. First, it guarantees individuals certain minimum family or medical emergency leaves that employers must follow when complying with federal leave standards. Second, the statute protects employees from any discriminatory practices the employer may use when an employee utilizes the features of the FMLA. Together, these two-prongs create a cause of action for either the denial of, or interference with, the rights afforded by the FMLA.

Even though the FMLA created far-reaching new coverage for employees, certain safeguards also exist to protect the employers' legitimate interests. Prior to granting the requested leave, an employer may request medical certification from an employee's health care provider confirming that a serious medical condition exists which warrants the

31. *See id.*

32. *See id.*

33. *See id.* at 9. *See also* 139 Cong. Rec. H365, H367 (February 3, 1993) (statements of Rep. Gordon).

34. *See* S. Rep. No. 103-3, at 9.

35. *See* 29 U.S.C. § 2611(2). The term "employer" also includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer [and also] any successor in interest of an employer." *Id.*

36. *See* 29 U.S.C. § 2615(a)(1). "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." *Id.*

employee's leave of absence.³⁷ If requested, an employee must provide such certification.³⁸ The certification must include the date the serious condition arose, the potential duration of the condition, the medical facts surrounding the condition, and a statement that the employee is needed to provide care.³⁹ In addition, the employer may request that the employee obtain a second opinion, albeit at the employer's expense.⁴⁰ Congress granted these safeguards to employers as an attempt to balance the interests of family life with the need for businesses to maintain their operational structure.

Congress authorized the Department of Labor (DOL) to enforce the specific provisions of the FMLA.⁴¹ Under this explicit grant of authority, the DOL adopted regulations that expanded upon, and attempted to clarify, the statutory provisions of the FMLA. In these regulations, the DOL interpreted the term "employer" to include

[a]ny person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of "employer" in section 3(d) of the Fair Labor Standards Act, 29 U.S.C. § 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of the FMLA.⁴²

While these regulations explicitly state that the FMLA's provisions are based upon those contained in the FLSA, not all district courts have interpreted the FMLA's definition of "employer" as such. Furthermore, only one circuit court has yet to rule on the issue. As the next section of this Comment will explore, the issue remains undecided as to whether the FMLA functions as an anti-discrimination statute, like the ADA, ADEA, and Title VII, or functions in accordance with the FLSA's provisions.

37. See 29 U.S.C. § 2613. "An employer may require . . . certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee. . . ." Furthermore, "[t]he employee shall provide, in a timely manner, a copy of such certification to the employer." *Id.*

38. See *id.*

39. See 29 U.S.C. § 2613(b)(1)-(4).

40. See 29 U.S.C. § 2613(c)(1).

41. See 29 U.S.C. § 2654.

42. 29 C.F.R. § 825.104(d) (1993) (repealed).

II. CASE LAW INTERPRETING "EMPLOYER" UNDER THE FMLA

Almost two years elapsed between the enactment of the FMLA and the emergence of the issue of individual liability for supervisors under the Act. In 1995, *Freemon v. Foley*⁴³ became the first case to confront the issue of whether an employee's immediate supervisor qualified as an "employer" under the FMLA. Using the statutory framework provided by the FLSA, in addition to an "operational control test," the *Freemon* court held that a supervisor could face individual liability under the FMLA.⁴⁴

From December 13, 1988, until July 7, 1994, plaintiff Jimmye Freemon was employed at the Mt. Sinai Hospital Medical Center in Chicago as a nutritionist in the Women with Infants and Children (WIC) program.⁴⁵ During Freemon's employment, the WIC program operated under the control of the Mt. Sinai Hospital. Freemon's supervisors at the WIC program included Gilda Ivy, Juan Corbin, and Steven Foley.⁴⁶ In turn, Foley reported to Steven Hulsh, Vice President of Human Resources for Mt. Sinai.⁴⁷

On May 29, 1994, Freemon learned that her five-year-old son developed chicken pox.⁴⁸ The next business day, Freemon notified her immediate supervisor, Gilda Ivy, that she would remain home from work to care for her child.⁴⁹ Two days later, Freemon discovered that her other son, Joshua, had developed a contagious fungal infection.⁵⁰ To ensure both children's care, Freemon desired to remain home.⁵¹ Freemon notified Ivy of her intentions, during which, Ivy informed Freemon that her vacation time would cover any absences until June 13, 1994.⁵² At the conclusion of this vacation time, Ivy expected Freemon to return to work at Mt. Sinai.⁵³

Unfortunately, while the boys were recovering from their initial ill-

43. 911 F. Supp. 326 (N.D. Ill. 1995).

44. *See id.* at 331.

45. *See id.* at 328.

46. *See id.*

47. *See id.*

48. *See* 911 F. Supp. at 328.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See* 911 F. Supp. at 328.

nesses, Joshua also contracted chicken pox.⁵⁴ On June 16, 1994, three days after Freemon's vacation time expired, Freemon contacted both Ivy and Foley to inform them that she expected to return to work on June 21, 1994.⁵⁵ After returning to work, Freemon provided a copy of her sons' medical records to Corbin.⁵⁶ Yet, Freemon's supervisors remained unsatisfied with her documentation explaining her lengthy absence from work.⁵⁷ Foley communicated the discrepancies surrounding Freemon's documentation to Mr. Hulsh, and as a result, she was suspended pending an investigation into the extended absence.⁵⁸ The subsequent investigation concluded that Freemon failed to comply with the company's request for additional medical information regarding her sons' conditions. On July 7, 1994, Foley contacted Freemon and informed her of her discharge.⁵⁹ Because of her discharge, Freemon filed a complaint and named Mt. Sinai, Ivy, Foley, Hulsh, and Corbin as co-defendants.⁶⁰

Defendants Ivy, Hulsh, Corbin, and Foley moved for summary judgment, contending that alleged violations of the FMLA limit actions to those against "employers."⁶¹ The defendants claimed they were not "employers" under the FMLA for the following reasons: (1) they did not employ fifty or more people during the previous twenty weeks,⁶² (2) they did not serve as officers or directors of Mt. Sinai, and (3) they did not nor possess any "unilateral authority" over employment decisions.⁶³ Because they did not qualify as "employers" under the FMLA, the defendants claimed that Freemon could not pursue an action against them in their individual capacities.

In addressing the defendants' motion, the *Freemon* court noted that defining supervisor liability involves a two-part test. The first part ex-

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.* at 328-329.

58. *See* 911 F. Supp. at 329. On June 28, 1994, Ivy confronted Foley with the problem encountered by Freemon's documentation. Ivy complained about Freemon's absence and recommended her termination. *Id.*

59. *See id.* Foley requested that Freemon supply either documented medical history or a medical release for her children's medical records. *See id.*

60. *See id.* at 326.

61. *See id.* at 330.

62. 29 U.S.C. § 2611(4)(A)(I). The FMLA requires an employer who "... employ[s] 50 or more employees for each working day during each of 20 or more calendar work weeks ..." *Id.*

63. *See Freemon*, 911 F. Supp. at 330.

amines the statutory definition,⁶⁴ while the second part applies an "operational control test" measuring whether "a defendant possessed supervisory authority over the complaining employee in whole or in part over the alleged violation."⁶⁵

After considering the defendants' motion, the court stated that the issue of individual liability under the FMLA was one of first impression in its circuit.⁶⁶ Noting that the plain language of the FMLA defining "employer" appeared unclear, the *Freemon* court looked to other employment law statutes for their interpretations of "employer." In doing so, the court examined comparable language contained in the ADA, the ADEA, and Title VII case law.⁶⁷ However, the *Freemon* court concluded that the language used in these three statutes differed from that used in the FMLA. While the ADA, ADEA, and Title VII all include the "and any agent" language, the court found that the FMLA extended employer status "to anyone acting directly or indirectly in the interest of an employer."⁶⁸ In further differentiating the FMLA from these statutes, the court stated that the regulations adopted for the FMLA followed those used within the FLSA.⁶⁹ Based on these observations, the *Freemon* court concluded that the FMLA more closely mirrored the statutory definition of "employer" utilized by the FLSA.⁷⁰

Once the *Freemon* court embraced the FLSA's definition of "employer," it found that several simultaneous employers may exist, all of whom could be held responsible for non-compliance with the Act.⁷¹ In

64. "Status as an employer under the FLSA is a question of law." *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1206 (7th Cir. 1985). Furthermore, "[t]he FLSA contemplates there being several simultaneous employers who may be responsible for compliance with the FLSA." *Freemon*, 911 F. Supp. at 331.

65. *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987). The FMLA borrowed this test from Title VII, which referred to the test as the "integrated employer" test. See 60 Fed. Reg. 2180, 2181 (Jan. 6, 1995).

66. See *Freemon*, 911 F. Supp. at 330.

67. See *id.*

68. *Id.*

69. See *id.* at 331 (citing 29 C.F.R. § 825.104(d)).

70. See 911 F. Supp. at 331. The court noted that the ADEA, ADA and Title VII all defined "employer" similarly as a "person who employs a [certain number of people]" and "any agent of such person." 42 U.S.C. § 12111(5)(A) (ADA); § 2000e(b) (Title VII); 29 U.S.C. § 630(b) (ADEA).

71. See *id.* at 331 (quoting *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991)).

fact, the court recognized that case law interpreting the FLSA has extended liability not only to corporate officers, but also to those "who, though lacking a possessory interest in the 'employer' corporation, effectively dominate its administration or otherwise act, or have the power to act[,] on behalf of the corporation vis-a-vis its employees."⁷² The *Freemon* court determined that as long as a defendant exercised some control over the alleged employment violation, individual liability could attach.⁷³

After applying this "operational control test" to the specific factual findings at issue, the court concluded that defendants Ivy, Hulsh, and Foley "exercised sufficient control over plaintiff's ability to take protected leave to qualify as 'employers' under the FMLA."⁷⁴ Accordingly, the court denied the defendants' summary judgment motion with the exception of Corbin, who the court found lacked supervisory control.⁷⁵

When faced with the issue of statutory interpretation of "employer" under the FMLA, another case followed the reasoning set forth in *Freemon*. In *Waters v. Baldwin County*,⁷⁶ an employee's supervisors brought a motion to dismiss, claiming they were not "employers" under the Act.⁷⁷ After viewing the case as one of first impression in the circuit, the *Waters* court noted that the plain language of the FMLA includes immediate supervisors as "employers."⁷⁸ The court based this reasoning on the *Freemon* court's analysis that the FMLA mirrors the FLSA word for word in its definition of "employer." After finding this similarity between the FMLA and the FLSA's statutory construction, the *Waters* court recognized that liability could attach to those other than the corporate entity.⁷⁹ As with the *Freemon* court before it, the *Waters* court found that the DOL issued regulations affirmatively addressing whether a supervisor, acting in the interest of the employer, should be treated as an employer.⁸⁰ Although the court realized that individual liability ex-

72. *Reich*, 998 F.2d at 329 (5th Cir. 1993); *See also Herman*, 161 F.3d at 303 (5th Cir. 1988).

73. *See Freemon*, 911 F. Supp. at 331; *Dole*, 942 F.2d at 966.

74. *Freemon*, 911 F. Supp. at 331.

75. *See id.* at 332. The court found no evidence to show Ms. Corbin played any role in the discharge of *Freemon*.

76. 936 F. Supp. 860 (S.D. Ala. 1996).

77. *See id.* at 862.

78. *See id.* at 863.

79. *See id.* at 863-64 (quoting *Dole*, 942 F.2d at 965).

80. *See id.* at 864.

isted under the FMLA, it failed to apply the operational control test because of the limited factual findings available at the time of the motion to dismiss.⁸¹

In *McKiernan v. Smith-Edwards-Dunlap Co.*,⁸² the court also held that the definition of "employer" contained within the FMLA closely parallels that used by the FLSA.⁸³ On April 17, 1988, Smith-Edwards-Dunlap [hereinafter Smith-Edwards] hired Joseph McKiernan as a driver/operator.⁸⁴ Five years later, in November 1993, McKiernan requested a leave of absence from Smith-Edwards to care for his wife who was experiencing serious pregnancy-related complications.⁸⁵ Smith-Edwards granted this leave with the stipulation that McKiernan return to work in February 1994.⁸⁶ On February 2, 1994, McKiernan requested another absence from Smith-Edwards because his wife and unborn child were still experiencing serious health problems.⁸⁷ Smith-Edwards granted this leave as well, but with McKiernan's agreement, discontinued his health insurance benefits.⁸⁸

On March 5, 1994, McKiernan's baby was born prematurely.⁸⁹ As a result, the baby remained in intensive care for two-and-one-half months, during which time McKiernan supplied Smith-Edwards with the required medical records required by the FMLA.⁹⁰ However, according to Smith-Edwards, McKiernan failed to return to work by May 2, 1994, the

81. See 936 F. Supp. at 864.

82. 66 Empl. Prac. Dec. (CCH) ¶43, 686, 1995 WL 311393 (E.D. Pa. 1995).

83. See *id.*; see also 29 U.S.C. § 203(d).

84. See *McKiernan*, 1995 WL 311393, at *2.

85. See *id.* McKiernan requested, and Smith-Edwards granted, an initial 90 day, unpaid leave of absence.

86. See *id.*

87. See *id.*

88. See *id.* The parties disputed whether Smith-Edwards set a date for McKiernan to return to work. See *id.* McKiernan claimed that the Personnel Director told him to "do whatever was necessary to care for his wife and family" without giving him a specified date to return to work. See *id.* However, Thomas Dougherty, Human Resources manager at Smith-Edwards, stated that the company only granted McKiernan another 90 day leave, good until May 2, 1994. See *id.* Dougherty also alleged that he told McKiernan "to check in with the company from time to time and be ready to work on May 2." *Id.*

89. See *McKiernan*, 1995 WL 311393, at *2.

90. See *id.*

date Smith-Edwards claimed McKiernan agreed to return to work.⁹¹ On May 17, 1994, after attempting to contact McKiernan, Smith-Edwards' Production Manager, Robert Jardel, sent a letter to McKiernan explaining he was terminated immediately for the failure to return to work by May 2, 1994.⁹² Thereafter, McKiernan filed suit against both Smith-Edwards and Jardel, alleging unlawful termination under the FMLA.⁹³

Defendant Jardel moved for summary judgment, claiming that his position was not covered by the FMLA's statutory definition of "employer." As both the *Freemon* and *Waters* courts before it, the *McKiernan* court looked to the plain language in the FMLA. Noting that the FMLA definition of employer appeared unclear from statute, the *McKiernan* court relied on the FLSA because of the regulations instituted by the DOL.⁹⁴ After accepting the similarity between the FMLA and FLSA, the *McKiernan* court held, consistent with other interpretations of the FLSA, that "any individuals . . . 'acting in the interest of an employer' are individually liable for violations of the statute."⁹⁵ Furthermore, the court found that FLSA case law interpreted the "acting in the interest of an employer" language to include any person that possesses the authority to hire or fire an employee.⁹⁶ Based on this rationale, the court found the FMLA definition of "employer" broad enough to encompass defendant Jardel, and thus denied him summary judgment. However, the court stated that although Jardel signed the letter discharging McKiernan, there existed a genuine issue of material fact as to whether Jardel qualified as an "employer" under the "operational control" test of the FMLA.⁹⁷

*Beyer v. Elkay Manufacturing Co.*⁹⁸ also examined the question of individual liability under the FMLA, and expanded its analysis beyond that contained in *Freemon*, *Waters*, and *McKiernan*. In *Beyer*, two individual defendants moved for summary judgment, contending that they

91. *See id.*

92. *See id.*

93. *See id.* at *1. Besides the claim under the FMLA, McKiernan also alleged claims under state law for wrongful discharge, intentional infliction of emotional distress and punitive damages. *Id.*

94. *See McKiernan*, 1995 WL 311393 at *1.

95. *Id.* at *3.

96. *See id.*

97. *See id.*

98. 1997 WL 587487 (N.D. Ill. September 19, 1997).

did not qualify as "employers" under the FMLA.⁹⁹

The court began its evaluation by looking into the statutory language used in the FMLA.¹⁰⁰ While recognizing that the statute only applies to employers of fifty or more employees,¹⁰¹ the court noted that the term "employer" also applies to "any person who acts, directly or indirectly, in the interest of [such] employer to any of the employees of the employer."¹⁰² Noting that there was no circuit court precedent on the issue, the court examined the holdings of both *Freemon*, which established individual liability under the FMLA, and *Frizzell v. Southwest Motor Freight*,¹⁰³ which followed anti-discrimination statutes in precluding individual liability. Adopting the reasoning from *Freemon*, the *Beyer* court found the language of the FMLA defining "employer" matched that used by the FLSA.¹⁰⁴ The court rejected using the language contained in both the ADA and Title VII because the language used in both statutes contains the clause "any agent of such person."¹⁰⁵ By distinguishing this agency law language, the court declined to establish individual liability because the clause itself invokes the theory of *respondeat superior*.¹⁰⁶

99. See *id.* at *3.

100. See *id.*

101. See 29 U.S.C. § 2611(4)(A)(i).

102. 29 U.S.C. § 2611(4)(A)(ii).

103. 906 F. Supp. 441 (E.D. Tenn. 1995).

104. See 1997 WL 587487 at *3.

105. *Id.*

106. See *id.*, at *8. The *Beyer* court referred to a case from the Seventh Circuit in which the Court questioned individual liability under the ADA. See *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995). The language of the ADA forbids discrimination by any employer "engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person." 42 U.S.C. § 12111(5)(A). In finding that no individual liability existed under the ADA, the Court first recognized that the language of the ADA defining employer mirrored that used in both the ADEA and Title VII. Accepting the reasoning of four other circuits in precluding individual liability, See *Smith v. Lomax*, 45 F.3d 402 (11th Cir. 1995); *Birbeck v. Marvel Lighting Co.*, 30 F.3d 507 (4th Cir. 1995) (ADEA); *Grant v. Lonestar*, 21 F.3d 649 (5th Cir. 1994) (Title VII); and *Lenhardt v. Basic Inst. of Tech.*, 55 F.3d 377 (8th Cir. 1995) (holding that no liability exists under Missouri statute similar to the ADA), the Seventh Circuit held that the individuals who do not meet the independent definition contained within the ADA cannot be held individually liable for violations of the Act. Thus, in finding no individual liability, the Court specifically addressed the inclusion of the agency language

As a further comparison between the employment statutes, the court recognized that the FMLA possesses a minimum employee threshold, as do both the ADA and Title VII,¹⁰⁷ while the FLSA contains no such provision.¹⁰⁸ The court found this argument compelling, yet determined that this ambiguity alone was not sufficient to dismiss the claim against the individual defendants.¹⁰⁹ Despite of the apparent inconsistency between the minimum employee thresholds included in the employment statutes, the *Beyer* court found that other factors existed that separated the FMLA from the ADA, ADEA, and Title VII. For example, the court noticed that the regulations enacted by the DOL copied the definition of "employer" contained within the FLSA.¹¹⁰ These regulations, as interpreted by the court, provide for individual liability.¹¹¹ In addition to the DOL regulations, the court also noted that the FMLA allows for punitive damages, whereas the ADA, ADEA, and Title VII provide merely for back pay and equitable damages.¹¹² Thus, the court concluded that the mere fact the FMLA contains a minimum employee threshold could not support a finding precluding individual liability like that used by the anti-discrimination statutes.¹¹³

In spite of the decisions in *Freemon*, *Waters*, *McKiernan*, and *Beyer*, not all courts have embraced the FMLA as consistent with FLSA actions. In *Frizzell v. Southwest Motor Freight*,¹¹⁴ the court decided the first case to view the FMLA as an anti-discrimination statute, similar to Title VII case law.¹¹⁵

Initially, the court focused on a claim brought under the FMLA and Tennessee Human Rights Act (THRA).¹¹⁶ The THRA's definition of "employer" includes "the state, or any political or civil subdivision thereof [sic], and persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indi-

through the use of *respondeat superior*.

107. See 1997 WL 587487, at *3.

108. See *id.*

109. See *id.*

110. See *id.*

111. See 29 C.F.R. § 825.104(d) (1998).

112. See 1997 WL 587487, at *3.

113. See 1997 U.S. Dist. Lexis 14459, at *9.

114. 906 F. Supp. 441 (E.D. Tenn. 1995).

115. See *id.*

116. *Id.*

rectly.”¹¹⁷ Because the THRA and Title VII both contained agency language defining “employer,” the defendant claimed that both statutes should be similarly construed to preclude individual liability.¹¹⁸ After viewing the statutory provisions of both the THRA and Title VII, including case law interpreting both,¹¹⁹ the court concluded that the differences between the THRA and Title VII were “not such that require different analyses or interpretations.”¹²⁰ The leading case interpreting the THRA similar to Title VII, *Arnold v. Welch*,¹²¹ held that an individual may not be held personally liable under the THRA. Accepting the reasoning of the *Arnold* court, the court in *Frizzell* stated that

the intent of Congress was to incorporate respondeat superior principles under Title VII, the remedies under Title VII are remedies an employer, not an individual would provide, and individual liability under Title VII is inconsistent with the limitation of its reach to employers with fifteen or more employees, compels this Court to hold that under the THRA, individuals not otherwise meeting the statutory definition of “employers” are not liable.¹²²

Once the *Frizzell* court determined that the THRA and Title VII extended the same coverage to “employers,” it noted *Arnold’s* application to individual liability.¹²³ Applying the analysis from *Arnold* to the FMLA claim, the *Frizzell* court decided to dismiss the plaintiff’s claim against the defendant in his individual capacity. The court granted the

117. TENN. CODE ANN. § 4-21-102(4)(e) (1997).

118. See *Frizzell*, 906 F. Supp. at 444.

119. See *Arnold v. Welch*, 1995 WL 785572, at *2 (E.D. Tenn. 1995); *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1995) (stating that the THRA and Title VII should be construed similarly); *but cf.* *Wood v. Emerson Electric Co.*, 1994 WL 716270, at *13-14 (Tenn. Ct. App. 1994) and *Gifford v. Premier Mfg. Corp.*, 1989 WL 85752, at *5 (Tenn. Ct. App. 1989) (holding that individuals may be liable under THRA). Based on these findings, the court found persuasive the holding of the Eighth Circuit in *Lenhardt v. Basic Institute*, 55 F.3d 377, 381 (8th Cir. 1995). In *Lenhardt*, the court found that the definition of “employer” in the Missouri Human Rights Act (MHRA) was the same definition used by Title VII. *Id.* at 379-380. Since the MHRA and THRA are similar, the *Frizzell* court found this applicable to the case sub judice.

120. *Frizzell*, 906 F. Supp. at 448.

121. 1995 WL 785572, at *2 (E.D. Tenn. 1995).

122. *Frizzell*, 906 F. Supp. at 449.

123. See *id.*

motion to dismiss based on the fact that a literal reading of the FMLA limited liability strictly to "employers."¹²⁴ Because *Arnold* construed the meaning of employer under the THRA and Title VII to preclude individual liability, the *Frizzell* court also believed that the FMLA protected individuals who are not "employers" under the Act.¹²⁵

In *Carter v. Rental Uniform Service of Culpepper, Inc.*,¹²⁶ the court also held that individual liability did not exist under the FMLA. In *Carter*, the plaintiff argued that the FMLA should be interpreted like the FLSA¹²⁷ and cited a Fourth Circuit case holding that defendants can be personally liable for violations of the FLSA.¹²⁸ The court, however, refused to accept the argument presented by the plaintiff. It distinguished *Brock* from the instant case because that decision limited its holding to where the individual defendant hired, fired, and directed the employees.¹²⁹ The court noted that nothing existed in the plaintiff's complaint worthy of assigning the individual defendant employer status, comparable to that which the court considered in *Brock*.¹³⁰ To the contrary, the *Carter* court stated that "[p]ersonal liability for violations of Federal employment laws generally has been rejected unless the defendant engaged in non-delegable acts like harassment."¹³¹ Based on the reasoning that no individual liability existed under the ADA, ADEA, or Title VII, the *Carter* court adopted *Frizzell* and held that no claim of individual liability exists under the FMLA.

While the previous cases were limited to the district court level, the court in *Wascara v. Carver*¹³² became the first circuit court to address the issue of whether public officials, in their individual capacities, are "employers" under the FMLA.

Although the appellants argued the Eleventh Circuit should apply its holding from *Busby v. City of Orlando*,¹³³ in which no individual liability attaches to claims under Title VII, the court did not find this argument persuasive. After comparing the FMLA's definition of "employer"

124. *See id.*

125. *See id.*

126. 977 F. Supp. 753.

127. *See id.* at 759.

128. *See Brock v. Hamad*, 867 F.2d 804, 808, n.6 (4th Cir. 1989).

129. *See* 977 F. Supp. 753, 759 (quoting *Brock*, 867 F.2d at 808, n.6).

130. *See id.* at 759-60.

131. *Id.* at 759.

132. 169 F.3d 683 (11th Cir. 1999).

133. *Wascara*, 931 F.2d 764 (11th Cir. 1991).

with the ADA, ADEA, Title VII and the FLSA, the court concluded that "Congress, in drafting the FMLA, chose to make the definition of 'employer' materially identical to that in the FLSA. . . ." ¹³⁴ The court concluded the only difference between the FMLA and FLSA definition of employer was that the FLSA included the phrase "in relation to" before the phrase "to any of the employees."¹³⁵

In addition to the nearly identical statutory language of the FMLA, the Eleventh Circuit identified that DOL regulations referred directly to the FLSA in defining who qualifies as an employer.¹³⁶ Therefore, because only a slight grammatical difference separated the two statutes, the *Wascura* court concluded that FLSA case law controlled the definition of employer under the FMLA.¹³⁷ Though individual liability may exist under the FLSA, the court also recognized the need to consider "the total employment situation in determining whether an entity qualified as an 'employer' under the Act."¹³⁸ After considering all the employment factors, the *Wascura* court dismissed the claims against the defendants in their individual capacities because the defendants were public officials.¹³⁹ The court reached this conclusion by applying FLSA case law which stated that a public official, with no control over a plaintiff's conditions of employment, could not qualify as an employer in his individual capacity under the FLSA.¹⁴⁰

134. *Wascura*, 169 F.3d at 686.

135. *Id.* The court distinguished the FMLA from the Title VII, ADA, and ADEA because those statutes all include the phrase "any agent of such a person" while the definition of employer in the FMLA is more expansive. *Id.*

136. *See id.* at 685-686.

137. *See id.* The court stated that "the difference is a matter of grammar, not substance." *Id.* at 686.

138. *Id.* *See Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995). In *Welch*, the Eleventh Circuit considered whether the police chief and certain Cullman County Commissioners qualified as employers under the Equal Pay Act. The Equal Pay Act is nearly identical to the FLSA. In dismissing the claim against the defendants in their individual capacities, the court analyzed the total employment situation and found the defendants had no authority to hire, fire, or modify the conditions of employment. Without this authority, the defendants fell outside of the statutory definition of employer under the Equal Pay Act. *Id.*

139. *See Wascura*, 169 F.3d at 687.

140. *See id.*

III. THE CONGRESSIONAL INTENT BEHIND THE FMLA: A DEMONSTRABLE PARALLEL TO THE FLSA

Although Congress failed to directly discuss supervisor liability in drafting the FMLA, the mere fact it fails to explicitly mention individual supervisors in the definition of "employers" does not settle the issue.¹⁴¹ Only if the court finds the language ambiguous should it then examine the legislative history to determine Congressional intent.¹⁴² In the FMLA, the definition of "employer" is not clear at first glance. By use of the words "any person," the definition appears to cover all levels of management, yet a court must analyze the totality of the FMLA's history in conjunction with agency law guidelines to conclude that Congress did not intend to limit liability strictly to the business employer.

Traditionally, Congress has enacted anti-discrimination statutes to eliminate employer conduct resulting in unfair discrimination against employees based on race, color, religion, age or disability in terms, conditions, or privileges of employment.¹⁴³ In order to meet these Congressional goals, courts have liberally interpreted the statutes "to secure compensation for victims of discrimination and to deter future potential discriminators."¹⁴⁴

With the FMLA, it appears that Congress exceeded its authority to enact anti-discrimination legislation.¹⁴⁵ "It is well settled that in expounding a statute, [the court] must not be guided by a single statement or member of a sentence, but look to the provisions of the whole law,

141. "[A] court should not look for an implication of congressional intent [nor] infer intent from mere silence." *Wyss v. General Dynamics Corp.*, 24 F. Supp.2d 202, 208-209 (D. R.I. 1998).

142. *See United States v. Oregon*, 366 U.S. 643, 648 (1961).

143. *See* 42 U.S.C. § 2000e-2(a) (prohibiting employer discrimination based upon race, color, religion, sex, or national origin); 29 U.S.C. § 623 (prohibiting employer discrimination based upon an employee's age); *and* 42 U.S.C. § 12112 (prohibiting discrimination based upon a qualified individual's disability).

144. Davida Isaacs, Comment, "*It's Nothing Personal*"-- *But Should It Be?: Agent Liability for Violations of the Federal Employment Discrimination Statutes*, 22 N.Y.U. REV. L. & SOC. CHANGE 505, 518 (1996).

145. Recently, the Supreme Court has struck down several acts of Congress, stating that Congress exceeded their power under § 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act); *Seminole Indian Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

and to its object and policy.”¹⁴⁶ Knowing this, the issue remains whether the means adopted by Congress are “congruent and proportional to the goal of preventing gender discrimination.”¹⁴⁷ Under the FMLA, an individual is allowed twelve weeks of unpaid leave to care for either the birth of a child, or, to care for a family member with a serious health condition.¹⁴⁸ Thus, the FMLA creates an affirmative entitlement which distinguishes it from other anti-discrimination legislation.¹⁴⁹ As the court stated in *Thompson v. Ohio State University Hospital*,

[t]he creation by statute of an affirmative entitlement to leave distinguishes the FMLA from other statutory provisions designed to combat discrimination. . . . Congress, insofar as it purports to rely on the Fourteenth Amendment as the basis of the FMLA, is attempting to dictate that the Equal Protection Clause . . . requires that employees be furnished twelve weeks of leave per year. This is patently the sort of substantive legislation that exceeds the proper scope of Congress’ authority under § 5.¹⁵⁰

Due to this entitlement, the means employed by the FMLA are not congruous or proportional to the goal of equal treatment.¹⁵¹ Congress may not create new constitutional rights using the catch-all approach of the Fourteenth Amendment. This recognition that the FMLA creates an entitlement strengthens the proposition that the FMLA functions as a new labor standard, not a means of combating anti-discrimination.

In spite of this entitlement, Mr. Boyd Rodgers, in his 1997 article on the FMLA,¹⁵² argues that the FMLA is an anti-discrimination statute. He claims the *Frizzell* court identified the proper analysis of the definition of “employer” under the FMLA as an anti-discrimination statute, utilizing *respondeat superior* principles, like the language found in Title VII.¹⁵³

146. *Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir. 1997).

147. *Thompson v. Ohio State Univ. Hospital*, 5 F. Supp.2d. 574, 579 (S.D. Ohio 1998).

148. See 29 U.S.C. § 2612(a)(1).

149. See *Thompson*, 5 F. Supp.2d. at 579.

150. *Id.*

151. See *id.* at 580.

152. See Boyd Rodgers, Note, *Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace*, 63 BROOK. L. REV. 1299, 1336-37 (1997).

153. See *id.* at 1336.

However, contrary to the argument that the FMLA tracks the meaning of other anti-discrimination legislation,¹⁵⁴ Congress omitted any reference to *respondeat superior* language while defining "employer" in the FMLA itself. While both the FMLA and FLSA definitions of "employer" include "any person acting, directly or indirectly, in the interest of an employer,"¹⁵⁵ the ADA, ADEA, and Title VII explicitly contain the language "and any agent of such person."¹⁵⁶ For instance, Title VII defines the term to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of the twenty or more calendar weeks in the current or preceding year, and any agent of such person. . . ."¹⁵⁷ To interpret the phrase "and any agent," courts have rejected the "plain meaning approach,"¹⁵⁸ which calls for conjunctively reading "a person" with "and any agent,"¹⁵⁹ in favor of the Supreme Court's interpretation of agency principles used within a federal statute.¹⁶⁰ In *Meritor Savings Bank v. Vinson*,¹⁶¹ the Court held that by adding the agency language into the statutory definition of employer, Congress intended the courts "to look to agency principles for guidance in the area of employer liability."¹⁶² Furthermore, the Sixth Circuit has held that a narrow, literal reading of the agent

154. See *id.* at 1340.

155. FLSA, 29 U.S.C. § 203; FMLA, 28 U.S.C. § 2611(4)(A)(ii).

156. ADA, 42 U.S.C. § 12111(5)(A).

157. 42 U.S.C. § 2000e.

158. This "plain meaning" approach to statutory construction can mean that "either the statute is unambiguous or the ordinary meaning of a statute's language should receive greater weight than legislative history or policy arguments." Rebecca White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 547, n.188 (1994). Thus, courts interpreting these anti-discrimination statutes have included agents within the statutory meaning of "employer" and withheld personal liability. See *Id.*

159. See *AIC*, 55 F.3d at 1281.

160. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

161. *Id.*

162. *Id.* at 71; *Wathen v. General Elec.*, 115 F.3d 400, 405-406 (6th Cir. 1997); *Miller v. Maxwell's Int'l. Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). In *Meritor*, the Court stated that "Congress' decision to define 'employer' to include any agent of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 71. However, while the "Supreme Court found that Congress' purpose was to define the scope of liability of the employer, it said nothing about any liability on the part of the employee/agent." *Id.*

clause in section 2000 (b) of Title VII implies that an employer's agent is a statutory employer for purposes of liability. Thus, the primary reason Congress included the "and any agent" language was to ensure that courts impose *respondeat superior* liability upon employers for the acts of their agents.¹⁶³

In this context, it becomes obvious that Mr. Rodgers' reliance on *Frizzell* is misplaced. Rodgers' analysis assumes that the *Frizzell* court thoroughly examined the FMLA and decided that its provisions provide the same framework as those used by Title VII.¹⁶⁴ However, it is evident the court failed to conduct any inquiry into the FMLA at all. The *Frizzell* court, in fact, limited its discussion only to the application of Title VII to the THRA without making any logical connection to the FMLA.¹⁶⁵ Although the court identified Title VII's incorporation of *respondeat superior* language in defining "employer," the court neither rationalized, nor explained, the difference between that statute's definition and the one used by the FMLA. This approach specifically ignores the content of certain case law interpreting Title VII. In an opinion relied upon by the *Frizzell* court, the Seventh Circuit stated, "the actual reason for the 'and any agent' language in the definition of 'employer' ensure that courts would impose *respondeat superior* liability upon employers for acts of their agents."¹⁶⁶ Therefore, because the *Frizzell* court failed to develop a correlation between the FMLA and Title VII interpretations of the term "employer," including the "and any agent" language, the analysis in finding that no individual liability exists is clearly flawed.¹⁶⁷

As noted under the FLSA, it is well-settled law that a corporate officer, sued individually and not in his official capacity, is liable along with the corporation for violations of the FLSA.¹⁶⁸ This individual li-

163. See *AIC*, 55 F.3d at 1281.

164. See Rodgers, *supra* note 153, at 1335-1336.

165. See *id.* at 1336.

166. *AIC*, 55 F.3d at 1281.

167. See Rodgers, *supra* note 153, at 1335-1336. Mr. Rodgers admits that the court only gave scant attention to the differences between the statutory differences of "employer" in the FMLA and Title VII. See *id.*

168. *Reich v. Midwest Plastic Eng'g, Inc.*, 1995 WL 478884 at *5 (W.D. Mich. 1995). "The overwhelming weight of authority is that a corporate officer within operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally under the FLSA for unpaid wages." *Id.*

ability exists because courts have held that the term "employer," as contained within in the FLSA and FMLA, is definitively broad enough to permit naming many employees, rather than just the corporate entity or officer, as a party-defendant.¹⁶⁹ In defining "employer" under the FLSA, the Seventh Circuit embodied what is now the majority approach of personal liability under the Act. The Seventh Circuit, in *Riordan v. Kempiners*, held that the FLSA "permit[s] naming another employee. . . as defendant, provided the defendant had supervisory authority over the complaining employee and was responsible in whole or in part for the alleged violation."¹⁷⁰ By utilizing this approach, the court, in effect, established the "operational control test" other courts have used in defining "employer" under the FMLA.

The Fifth Circuit followed this reasoning in *Reich v. Circle C. Investments, Inc.*¹⁷¹ In *Circle C.*, the issue was whether personal liability attached to two co-owners of a nightclub, in addition to the corporate entity, for alleged violations of the FLSA.¹⁷² The court initially determined that the FLSA definition of "employer" applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee."¹⁷³ Expanding further on the definition provided by the *Riordan* decision, the *Circle C.* court found that the FLSA applied to "an[y] individual, though lacking a possessory interest in the 'employer' corporation [who] effectively dominates its administration, or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees."¹⁷⁴

Applying this rule to the facts, the court concluded that although the defendant had no ownership interest in the corporation, he exerted sufficient control over the employees of the club through a consultation agreement to fall within the FLSA's definition of "employer."¹⁷⁵ Thus,

169. See *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) ("The FLSA contemplates there being several simultaneous employers who may be responsible for compliance with the FLSA."); *Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609, 611-612 (3rd Cir. 1971).

170. *Riordan*, 831 F.2d 690, 694 (7th Cir. 1987).

171. 998 F.2d 324, 329 (5th Cir. 1993).

172. See *id.* at 324.

173. *Id.* at 329; see also *Dole v. Haulaway, Inc.*, 723 F. Supp. 274, 286 (D. N.J. 1989); 29 U.S.C. § 203(d).

174. 998 F.2d at 329.

175. See *id.*

the Fifth Circuit recognized that an individual can qualify as an "employer" under the FLSA if he independently exercises control over personnel matters as part of his/her regular duties. Using the framework set forth in *Circle C.*, and after considering the difference between the agency law language included in Title VII against the FMLA, the logical conclusion is that Congress did not intend to limit the term "employer" in the FMLA to the same coverage employed in Title VII.¹⁷⁶

The second part of the liability status for an individual defendant includes an "operational control test," like the one used in *Circle C.* This test is the second prong for determining liability under the FMLA, under which a supervisor has the opportunity to demonstrate that his actions were not deliberate violations of the Act. The *McKiernan* court appropriately applied this test to determine whether individual liability should attach to the corporate supervisor. Since the question of whether a person is an "employer" is a question of law, the *McKiernan* court appropriately determined that more facts were necessary to determine whether an individual supervisor's status qualifies as an "employer" under the FMLA. Given the facts set forth in the motion for summary judgment, it remained unclear whether the individual supervisor possessed the actual authority to fire the employee or merely fulfilled the administrative role of notification.¹⁷⁷ In reaching this conclusion, the court correctly declined to declare the individual defendant an "employer" for purposes of the FMLA. If Joseph McKiernan had alleged sufficient facts to prove that the individual supervisor possessed "operational control" over him, the outcome would have been different. Recognizing that the FMLA closely follows the FLSA, the *McKiernan* court correctly interpreted the applicable case law and considered the possibility that supervisors could be individually liable for violations of the FMLA.

176. In contrast, the FMLA defines employer more expansively than the ADA, ADEA, and Title VII. See *Wascara*, 169 F.3d at 686.

177. See *id.* at *3. Although the court applied the FLSA interpretation of "employer" to the FMLA statute, the fact that Jardel signed McKiernan's letter of discharge remained insufficient to establish Jardel's authority in making the actual decision to terminate employment. *Id.*

IV. OTHER STATUTORY PROVISIONS SUPPORT INTERPRETING THE FMLA LIKE THE FLSA

A. Department of Labor Regulations

Congress explicitly authorized the Department of Labor to implement regulations designed to further the policies of the FMLA.¹⁷⁸ It is uncontroverted that the DOL possesses the power to draft and implement certain regulations consistent with the intent of Congress in the original Act.¹⁷⁹ Although the regulations promulgated by administrative agencies and government entities may not have the same force of law, they are entitled to significant weight due to the agency's expertise.¹⁸⁰

A number of courts interpreting the FMLA have looked to the DOL regulations for guidance beyond the apparent similarity between the FMLA and FLSA. According to the *Wascura* court, the applicable Code of Federal Regulations provision constituted a large role in determining that the FMLA should be given the same meaning as its counterpart in the FLSA. The court cited the relevant provision in the regulations and concluded that "individuals . . . acting in the interest of the employer are individually liable under the Act."¹⁸¹ Based on this interpretation, the *Wascura* court determined that the DOL drafted the regulations broadly enough to incorporate individuals, such as corporate officers or those exercising control over employees conditions of employment, as acting in the interest of an employer.¹⁸² Therefore, because the FMLA's regulations were derived directly from, and cited directly to, the FLSA, the *Wascura* court determined that it logically follows that corporate supervisors can be susceptible to individual liability under the FMLA.¹⁸³

178. See 29 U.S.C. § 2654 (1999).

179. See *Chevron v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 843-44 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). In *Chevron*, the Court upheld a challenge against the power of the EPA to implement regulations controlling pollution-emitting devices. The Court stated that "[t]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, explicitly or implicitly, by Congress." 467 U.S. at 843.

180. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

181. *Wascura*, 169 F.3d at 686.

182. See 29 C.F.R. § 825.104.

183. See *Reich*, 1995 WL 478884 at *6.

The Supreme Court, in *Pauley v. Bethenergy Mines Inc.*,¹⁸⁴ held that it is proper for lower courts reviewing DOL regulations to show deference to the agency's interpretation of an ambiguous provision in the Act, as long as Congress has delegated policy making authority to the agency.¹⁸⁵ While it is clear that Congress granted the DOL authority to implement the regulations, the lower court must evaluate whether the DOL's interpretation of the ambiguous provision is "reasonable."¹⁸⁶ Here, the DOL's interpretation is reasonable and consistent with the intent of Congress. Although Congress failed to explicitly provide for supervisor liability in the Act, the regulations promulgated by the DOL do not limit or misinterpret the language given in the FMLA. In fact, the DOL realized the substitution of language from the FLSA in defining "employer" under the FMLA. Before implementing the regulations based upon the similar language, the DOL invited public comment on the provisions of the FMLA. After considering the public comments on the issue of supervisor liability, the DOL again reinforced that Congress borrowed the definition of "employer" directly from the FLSA.¹⁸⁷ The DOL maintained this approach in the introduction of the interim final rules on June 4, 1993. This consistent approach led the DOL to reasonably conclude that the definition of "employer" is identical between the two statutes, and therefore, recognized that supervisors may be personally liable for violations of the FMLA.¹⁸⁸

While valid policy arguments exist both for and against personal liability, the fact remains that via the notice and comment period, the agency considered all the relevant factors in reaching their final ruling. Although commentators expressed concern regarding the effect of this policy, a court considering interpretation of the DOL's regulations must "properly rely upon the administration's views of wise policy to inform

184. 501 U.S. 680 (1991). In *Pauley*, the petitioner sought review of the denial of benefits under the Black Lung Benefits Act. *Id.* The issue focused on the regulations promulgated by the Department of Labor, specifically, what level of deference should be given to an agency's interpretation of a seemingly ambiguous statute. *Id.*

185. See *Pauley*, 501 U.S. at 681; *Chevron*, 467 U.S. at 866.

186. *Chevron*, 467 U.S. at 845. "A court may not substitute its own construction of a statutory provision for a reasonable determination made by the administrator of the agency." *Id.*

187. See The Family and Medical Leave Act, 60 Fed. Reg. 2180, 2181 (1995) (to be codified at 29 C.F.R. § 825.104(d)).

188. See *id.*

its judgments.”¹⁸⁹ Therefore, because the agency properly evaluated the language and intent of the statute, the regulations promulgated by the DOL should be given controlling weight by courts interpreting supervisor liability for violations of the FMLA.

B. Penalties

Another fact that supports interpreting the FMLA similar to the FLSA is the penalties established under the FMLA. Within the FMLA, the penalties imposed are more expansive than those traditionally imposed by anti-discrimination statutes.¹⁹⁰ While the FMLA includes a provision for equitable relief,¹⁹¹ like most anti-discrimination statutes, the FMLA also includes a provision providing for punitive damages equal to the amount of lost wages, benefits, and other compensation.¹⁹² The FMLA further defines that a right of action to recover these damages may be maintained against “any employer.”¹⁹³ This inclusion of “any employer” differentiates the FMLA from other anti-discrimination statutes. Highlighting this contrast, the Seventh Circuit in a recent case involving the ADA concluded that when Congress defined “employer” in the ADA it granted remedies that only employing entities, and not individuals, could provide.¹⁹⁴ However, in the FMLA, Congress limited the punitive damages available against any employer but noted that such damages are also applied to individuals, not only corporate entities.¹⁹⁵ Additionally,

189. *Chevron*, 467 U.S. at 865.

190. See Rebecca Wilson, Note, *Using Case Law and Strategies to Defend Family and Medical Leave Act Claims*, 64 DEF. COUNS. J. 534, 544 (1997) (stating that counsel should look to the FLSA to interpret the damages provision under the FMLA).

191. See 29 U.S.C. § 2616(B). The FMLA provides for “such equitable relief as may be appropriate, including employment, reinstatement, and promotion.” *Id.*

192. See 29 U.S.C. § 2616(A)(iii).

193. See 29 U.S.C. § 2616(2).

194. See Paul J. Kennedy, *When Supervisors Are Sued*, 42 SOC’Y FOR HUM. RES. MGMT. 124 (Jan. 14, 1998) (discussing *EEOC v AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279 (7th Cir. 1995)).

195. In 1991, Title VII amended the damages provision of the Act to include punitive and compensatory damages. See 42 U.S.C. § 2000e. While some plaintiffs have argued that these stiffer penalties extend to individual supervisors, courts have concluded that nothing in the legislative history of the Act supports the view that damages were expanded for the purpose of creating individual liability for supervisors. See Jan Henkel, Note, *Discrimination by Su-*

the FMLA allows for recovery of liquidated damages equal to the sum of any salary, wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation.¹⁹⁶ Interest may also be applied to the damages and is to be calculated at the current rate.¹⁹⁷ Consistent with Congress' intention to establish a labor standard, these equitable and punitive relief provisions closely follow those set forth in the FLSA.¹⁹⁸ Thus, this inclusion of increased civil penalties in the FMLA strengthens the argument that Congress intended to develop a labor statute like the FLSA.¹⁹⁹

C. Minimum Employee Provision

It has been stated that "[i]f Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress would allow civil liability to run against individual employees."²⁰⁰ While this may be true, language in the FMLA demonstrates the intent of establishing the Act as a labor standard, distinctively different than the concepts contained within the ADA, ADEA, and Title VII. Through the addition of the minimum employee threshold in the FMLA, Congress intended to protect small businesses without using the blanket coverage guaranteed by anti-discrimination statutes. Congress took great care to remember the economic effects a new labor standard would impose on the business community by creating an exemption for businesses with fewer than fifty employees.²⁰¹ By creating an exemption for

pervisors: Personal Liability Under Federal Employment Discrimination Statutes, 49 FLA. L. REV. 767, 774-775 (1997). "It is a long stretch to conclude that Congress silently intended to abruptly change its earlier vision through an amendment to the remedial provisions of the statute alone." *AIC*, 55 F.3d at 1281.

196. See *AIC*, 55 F.3d at 1281.

197. See *id.*

198. However, the FLSA also provides for criminal penalties. See 29 U.S.C. § 216(b).

199. In *U.S. v. Ron Pair Enter. Inc.*, 489 U.S. 235, 242 (1989), the Court held that there are few instances where the Court will deviate from the language of the statute itself. See *id.* This deviation is only limited to "rare cases [in which] the literal interpretation of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Id.*

200. *Williams v. Banning*, 72 F.3d 552, 553 (7th Cir. 1995) (quoting *Miller*, 991 F.2d at 587).

201. See 139 Cong. Rec. S1254, S1260 (Feb. 3, 1993) (statements of Sen.

small businesses, the FMLA actually excludes from coverage approximately ninety-five percent of the workforce.²⁰²

Part of this analysis focuses on determining which entity best served the role of implementing statutory goals and thus, accepting liability. Focusing on the frameworks of the statutes themselves, the courts have nearly unanimously held that employers best serve this function.²⁰³ Under the FMLA, providing individual liability for an employee's supervisor is consistent with the need for greater accountability in the workplace. Supervisors play a central role in decisions involving family leave, through which, family policies are only effective to the extent that supervisors support them. While one author contends that the administrative requirements are more appropriately applied to business entities when the statutes themselves are silent on the issue of supervisor liability,²⁰⁴ the factual evidence supports the contrary. As another article stated

[e]mpirical data shows that employers have experienced little difficulty in implementing family and medical leave. A survey of employers in four states that require parental leave found that ninety-one percent of respondents said that they did not have a problem implementing the laws. Thirty-nine percent found implementation extremely easy, while only nine percent found implementation difficult. Further, seventy-one percent reported no increase in training costs; fifty-

Levin). "The sponsors of this legislation have taken great care to incorporate provisions which protect business interests while still providing for family leave, seeking to lessen the burden on businesses, and make implementation of this leave a smoother procedure." *Id.* Furthermore, extensive statistical testimony indicated that the impact produced on the employers would be minimal. *See Id.* at S1255 (statements of Sen. Dodd); *see id.* at S1259 (statements of Sen. Lautenberg); *see id.* at 1260 (statements of Sen. Levin).

202. *See* 139 Cong. Rec. S1254, 1262 (Feb. 3, 1993) (statements of Sen. Kerry). In referring to the exemption of employers with less than fifty employees, Mr. Kerry stated that "th[e] provision alone exempts 95% of U.S. business and half of all workers." *Id.*

203. "Assuming a trickle-down theory occurs, courts have held the employer liable because it could subsequently punish the discriminatory employee for the damages caused upon it." *Vodde v. Indiana Michigan Power Co.*, 852 F. Supp. 676, 681 (N.D. Ind. 1994) (holding that "the deep pocketed employer . . . can be counted on to be the most effective guardian of the marketplace").

204. *See* Henkel, *supra* note 195, at 772-3 (exploring the reasons to withhold personal liability under Title VII).

five percent reported no increase in administrative costs; and eighty-one percent reported no increase in the cost of unemployment insurance. Only a small minority reported significant cost increases in training, administration, and unemployment. Regarding health insurance costs, seventy-three percent of the respondents reported no increase.²⁰⁵

Thus, finding liability for those who possess control over an employee's terms or conditions of employment better serves to deter future potential violations. By holding supervisors to the same standard as the business employer itself, the FMLA insures an effective means of pressing supervisors not to act or engage in certain conduct. Unlike Title VII, which depends on businesses to monitor their employment practices, the fear of individual liability from the FMLA provides an additional check to insure compliance and guarantees minimum standards for employee welfare. This rationale extends from Congress' finding that the business community itself failed to provide an effective remedy to correct this employment problem. Without this threat of legal action, a supervisor's inappropriate conduct may not be deterred. Although the business employer may be in a better financial position to compensate an aggrieved employee, by providing alternative accountability for the individual supervisor who made the employment decision, the FMLA will realize its full potential and achieve Congress' desired results.

V. CONCLUSION

Careful consideration of the policies behind the enactment of the FMLA shows Congress intended a broad statute to grant expansive coverage for working individuals. In the statute, Congress intended the FMLA to include certain aspects of anti-discrimination provisions.²⁰⁶ Stopping short of flatly adopting an anti-discrimination statute, Congressional debate demonstrated the FMLA's main purpose was to mandate a new labor standard.²⁰⁷ Although the FMLA included this explicit reference to an anti-discrimination provision, the Act borrows the defi-

205. Lenhoff & Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 52-3 (1994).

206. See 29 C.F.R. § 825.102.

207. See 139 Cong. Rec. S1254, 1257 (Feb. 3, 1993) (statements of Sen. Dodd).

inition of "employer" directly from their previous FLSA legislation. By imposing the standards set forth in the FLSA, Congress removed any question as to whether the principle of *respondeat superior* would apply when considering the term "employer" within the FMLA. With no mention of agency language in the statute, the courts have appropriately developed an "operational control test" to address whether a supervisor meets the statutory definition in the FMLA. If a supervisor meets this "operational test," the penalties established by the FMLA contain provisions usually enforced against corporations and individuals. Thus, when interpreting future FMLA cases, courts should interpret the term "employer" in the same fashion as it is used in the FLSA and find that an individual supervisor can be personally liable for an FMLA violation.

